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ARTICLE

THE EVOLUTION OF MONTANA'S PRIVACY-ENHANCED SEARCH AND SEIZURE ANALYSIS: A RETURN TO FIRST PRINCIPLES

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This article is intended to examine the Montana Supreme Court's right to privacy jurisprudence in search and seizure cases. The thesis of the article is that the court's current jurisprudence dating from approximately 1993 and continuing to the present is a return to the intent of the framers of the 1972 Constitution and to the court's jurisprudence in the period immediately following the passage of the Constitution. We contend that the period of the 1980's was an aberration. During

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that period, the court switched to a search and seizure analysis more in line with that of the United States Supreme Court. The First Part discusses Montana's early search and seizure analysis focusing on the period before and right after the passage of the 1972 Montana Constitution. Part II discusses cases from the 1980's and focuses on how those cases were different than what had gone before or what is occurring now in the court's jurisprudence. Part III analyzes more recent cases where the court has returned to a privacy enhanced analysis.[1] Part IV compares cases from these three periods in different search and seizure situations. Part V suggests more use of the historical record to support the court's privacy enhanced analysis.

I. MONTANA'S EARLY SEARCH AND SEIZURE ANALYSIS

The groundwork for Montana's current search and seizure analysis was laid nearly a half-century before the ratification of the 1972 Constitution.[2] In 1921, the Montana Supreme Court stated that Montana's warrant requirement was as trenchant as the Fourth Amendment, and "expressive of the same fundamental principles" embodied by the federal requirement, including the notion that the rights of individuals are to be protected from government intrusion.[3] The court reinforced this pronouncement in *State ex rel. King v. District Court*[4] by further defining the search and seizure provision of Montana's 1889 Constitution as absorbing a privacy right, which was neither mandated by that Constitution nor expressed in the common law.[5]

On the eve of the 1972 Constitutional Convention, the Montana court again recognized that the search and seizure analysis implicated a constitutional right to privacy. In *State v. Brecht*,[6] the court explained that a violation of the federal privacy right breached the privacy protection of Montana's own

1. *See* LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION, A REFERENCE GUIDE 52-54 (2001).

2. *See* Larry M. Elison & Dennis NettikSimmons, *Right of Privacy*, 48 MONT. L. REV. 1, 8 (1987). The authors hope that this article will be a worthy follow up to Elison's and NettikSimmons's very important article.

3. State *ex rel.* Samlin v. District Court, 59 Mont. 600, 609, 198 P. 362, 365 (1921); *see also id.* at 9.

4. 70 Mont. 191, 224 P. 862 (1924).

5. *Id.* at 197-98, 224 P. at 864-65.

6. 157 Mont. 264, 485 P.2d 47 (1971).

search and seizure provision.[7] According to the court, testimony based on a defendant's telephone conversation, and overheard by the witness, was inadmissable under *Katz v. United States*[8] and the common law "right to be let alone,"[9] which was enforceable through the search and seizure provision of the 1889 Constitution.[10]

The protection against unreasonable searches and seizures and the concept of privacy became more closely intertwined following the ratification of the 1972 Constitution. The framers were inclined to interpret the search and seizure provision of the new Constitution in conjunction with the privacy guarantee to produce a more formidable shield for the privacy right.[11] According to one delegate, § 11 is "the procedural companion of substantive § 10 . . . [and together] they stipulate that even after the showing of a compelling state interest the state must abide by certain procedural guidelines."[12] Like the Montana Supreme Court had suggested in *King*, § 11 served to protect the Constitution's privacy guaranty, and was, in that sense, a facet of the concept of privacy.[13] The delegates clearly contemplated that the right to privacy would shield Montana citizens from unreasonable searches and seizures. The following are statements from the Convention delegates:

> We feel that this (the right to privacy clause), as a mandate to our government, would cause a complete reexamination and guarantee our individual citizens of Montana this very important right - the right to be let alone; and this has been called the most important right of them all. You all had placed on your desk the Montana Standard's editorial of February 3, 1972. I think it states it very well. Times change. That, in a nutshell, is why the

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7. *Id.* at 270, 485 P.2d at 50-51; *see also* Elison & NettikSimmons, *supra* note 2, at 10.

8. 389 U.S. 347 (1967). In his concurring opinion to *Katz*, Justice Harlan articulated the following test for a protected privacy interest as requiring "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'." *Id.* at 361.

9. Welsh v. Roehm, 125 Mont 517, 523, 241 P.2d 816, 819 (1952).

10. *See* Elison & NettikSimmons, *supra* note 2, at 9-10.

11. *See id.* at 12 (stating that even though the statements of the framers "suggests that the search and seizure provision and the privacy provision were intended to address two different kinds of governmental intrusion, comments by the Bill of Rights committee and other delegates suggest that the two provisions could be applied together in certain circumstances").

12. 2 MONT. CONST. CONV. TR. 633 (1972).

13. *See* Elison & NettikSimmons, *supra* note 2, at 12 (stating that "the search and seizure provision seems ultimately to have been viewed as one aspect of the more comprehensive concept of privacy").

> Constitutional Convention delegates in Helena are working on a new and more modern government charter for Montana. Today, with wire taps, electronic and bugging devices, photo surveillance equipment and computerized data banks, a person's privacy can be invaded without his knowledge and the information so gained can be misused in the most insidious ways. It isn't only a careless government that has this power to pry: political organizations, private organizations, private information gathering firms, and even an individual can now snoop more easily and more effectively than ever before. . . . We think the right of privacy is like a number of other inalienable rights; a carefully worded constitutional article reaffirming the right is desirable.'[14]

During the decade or so following the inception of Montana's "free standing"[15] privacy right, the Montana court adhered to its earlier decisions in *King* and *Brecht*, as well as the sentiment expressed by the framers, and continued to shape a search and seizure analysis that was amenable to Montana's privacy guarantee. The court announced that under Article II, §§10 and 11, Montanans were afforded a greater protection against government intrusion than was available under the federal Constitution. Until that time, the court had diverged from federal doctrines only when underlying provisions of the Montana Constitution differed significantly from the counterpart provisions of the United States Constitution.[16] Under this "dual approach" to constitutional construction, the court followed federal interpretations of federal constitutional provisions that mirrored Montana's constitution.[17] Recognizing that Article II, § 11 is textually identical to the Fourth Amendment, the court nonetheless started to evade the "dual approach" by combining § 11 with § 10, and interpreting search and seizure issues in conjunction with the privacy guarantee, to create a search and seizure provision, which differed significantly from the Fourth Amendment.[18] On this basis, the court justified its independent search and seizure analysis.[19]

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14. 5 MONT. CONST. CONV. TR. 1681 (1972).

15. Mark Silverstein, Note, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 231 (1986).

16. *See id.* at 232.

17. *Id.* According to the author, the court complied with the "dual approach" only until 1986 when the doctrine was renounced. *See id.*

18. *See id.* at 233.

19. At least one commentator has criticized Montana's approach by arguing that the textual right to privacy found in Article II, § 10 was derived from federal case law which itself came from a right found to be implicit in the Bill of Rights. *See* Ronald K. L. Collins, *Reliance on State Constitutions-The Montana Disaster*, 63 TEX. L. REV. 1095, 1128 (1985). The author recalled Justice Shea's refusal to "'march lock-step with

The effect of the court's independent analysis was apparent in at least a half-dozen search and seizure cases decided between 1971 and 1985.[20] In defense of its use of the privacy guarantee, the court offered the following argument:

> [the] [a]pplication of this right is as diverse as the components which make up a free ordered society. . . . Inasmuch as a citizen's personality and thoughts are protected as private, so are a citizen's physical solitude and right to be let alone. . . . The right of individual privacy, the right to be secure in one's home, was prized in Montana even before the adoption of the 1972 Montana Constitution. . . . The policy to set a special store on the right of privacy was expressly enunciated in [Article II, § 10] and the implementation of that policy was continued by this Court.[21]

However, in conjunction with such references to an overriding privacy interest, the court demonstrated an unwillingness to abandon certain established federal search and seizure doctrines. Of particular significance was the court's adherence to *Katz*. In deference to its pre-1972 decisions, the court continued to apply the "reasonable expectation of privacy" test when determining which interests were protected under Article II, § 10.[22] To resolve whether a person's right to privacy had been violated as a result of a State action, the court considered "whether the party . . . subjectively expected the information to be and remain private, and whether society [was] willing to recognize that expectation as reasonable."[23]

Still, the court's application of *Katz* was by no means restricted to the scope and meaning assigned to the "reasonable expectation of privacy test" by the federal courts. Rather, the Montana court was inclined, on occasion, to "make independent

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pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution.'" *Id.* at 1128. According to the author, Justice Shea's statement implied that, "textual differences, and textual differences alone, allow independent interpretations of state law." *Id.* *But see* Ellison and Nettiksimmons, *supra* note 2 at 12.

> [C]omments by the Bill of Rights committee and other delegates suggest that the two provisions could be applied together in certain circumstances. The committee stated that the search and seizure section . . . is the procedural companion of substantive § 10 . . . They stipulate that even after the showing of a compelling state interest, the state must abide by certain procedural guidelines. Thus, the search and seizure provision seems ultimately to have been viewed as one aspect of the more comprehensive concept of privacy.

Id. (citing 2 MONT. CONST. CONV. TR. 633 (1972)).

20. Collins, 63 TEX. L. REV. at 1128.

21. State v. Hyam, 193 Mont. 51, 630 P.2d 202 (1981).

22. *See* Elison & NettikSimmons, *supra* note 2, at 21.

23. *Id.* (citing Human Rights Div. v. City of Billings, 199 Mont. 434, 442, 649 P.2d 1283, 1287 (1982)).

use of the reasonable expectation of privacy test."[24] For example, in cases involving searches of homes, the court discarded its strict interpretation of *Katz* by inserting a policy element that focused on the overriding concern for the privacy of the home as "the situs of protected private activities."[25] Similarly, the court broadened *Katz* by accounting for the privacy expectations not only of defendants, but also of persons associated with the defendants, such as family and friends.[26]

In short, Montana's search and seizure analysis had not taken on an entirely independent character. It seems, that, during the decade or so following the Constitutional Convention, the court struggled with two potential search and seizure analyses, a traditional analysis based on federal doctrines, such as *Katz*, and a non-traditional approach which focused on an apparent heightened privacy right. Rather than adopt one approach, to the exclusion of the other, the court intentionally (or not) opted for a balanced measure of each. Thus, Montana's search and seizure jurisprudence, during this period, may best be characterized as the beginnings of a purely independent privacy-based search and seizure analysis in Montana, from a court that was reluctant to rely solely on § 10, but which recognized that, in light of Article II, § 10, the traditional federal doctrines were inadequate..

To this end, the court announced, in *Butte Community Union v. Lewis*,[27] that it "need not blindly follow the United States Supreme Court when deciding whether a Montana statute is constitutional pursuant to the Montana Constitution."[28] And, perhaps, the most revealing statement of the court's intent appeared in a 1985 search and seizure decision, in which Justice Shea announced: "As long as we guarantee the minimum rights guaranteed by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution."[29]

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24. Elison & NettikSimmons, *supra* note 2, at 25.
25. *Id.*
26. *See id.*
27. 219 Mont. 426, 712 P.2d 1309 (1986)).
28. *Id.* at 433.
29. State v. Sierra, 692 P.2d 1273, 1276 (1985), quoted in Collins, *supra* note 19, at 1129.

II. CHANGES IN THE 1980'S

If the evolution of Montana's privacy-enhanced search and seizure analysis can be observed in three distinct episodes, the middle period, beginning in the mid 1980's and fading sometime during the early 1990's, consisted of a sort of backlash against the incorporation of Montana's privacy guarantee into its search and seizure decisions. Although there was no absolute, express renunciation of the trend initiated in the mid-1970's, what we have is a collection of decisions from this period that demonstrate a re-examination of the significance of Article II, § 10 and its place in search and seizure law.[30] In other words, if viewed as a continuum, Montana's search and seizure analysis has steadily become more observant of the State's privacy guarantee, with the exception of this series of cases decided during the mid 1980's, in which the court reaffirmed its willingness to follow the direction of the federal courts in matters of criminal procedure.

At least one author has commented that by refusing to rely on Article II, § 10, the Montana Supreme Court "expanded the powers of law enforcement authorities in this period."[31] This expansion was particularly evident in the court's surveillance decisions. Eliminating the warrant requirement for certain types of monitoring, the court adopted a rationale, also expressed by the federal courts, that in any conversation, one party assumes the risk that the other party to the conversation might have consented to the monitoring or recording of the conversation.[32] Thus, the court had rejected the notion of a reasonable expectation of privacy in one's conversations.[33] This is even though prior to the 1972 constitution, Montanans had such a right.[34] This overruled a long line of cases which had held otherwise and is expressly opposite to statement of the constitutional convention delegates who spoke very negatively on the issue of electronic surveillance.[35] Another example of the court's jurisprudence in the 1980's is *State v. Kelly*,[36] where the court decided a search and seizure case based entirely on federal

30. *See* Silverstein, *supra* note 15, at 233.

31. *Id.* The author was referring to *State v. Long*, 216 Mont. 65, 700 P.2d 153 (1985).

32. State v. Brown, 232 Mont. 1, 8, 755 P.2d 1364, 1369 (1988).

33. *Id.*

34. *See* State v. Brecht, 157 Mont. 264, 270, 485 P. 2d 47, 50 (1971).

35. *See supra* note 19 and accompanying text.

36. 205 Mont. 417, 668 P. 2d 1032 (1983).

cases without even referring to the right to privacy clause.

The court's surveillance decisions suggested not so much a lack of interest in Montana's heightened privacy right, but rather a preference for firmly rooted federal doctrines. Perhaps, a more acute example of this was the court's abandonment of the fundamental premise that the right to be free from unreasonable searches and seizures included searches and seizures conducted by private citizens. In *State v. Long*,[37] the court overturned six earlier decisions, to hold that "[c]itizen's rights articulated in the Constitution proscribed only state action; [and] therefore, if a private citizen invaded the privacy of another, there was no violation of the Constitution itself."[38] The court had based its decision, in part, on a concept expressed by the federal courts, that the exclusionary rule was intended only to deter police misconduct, and that its application is limited to that end.[39]

Justice Sheehy's dissent, in that case, demonstrates the extent to which *Long* had deviated from the court's earlier search and seizure cases. According to Sheehy,

> Today's opinion has derailed the one vehicle that gave strength and vitality to the unique right of privacy enshrined in our State Constitution. Our state right of privacy had meaning and force in our lives because this Court excluded evidence obtained in violation of privacy. Until today, it was the proud accomplishment of this Court, in the several cases today overruled, that enhanced by judicial decision that the framers proclaimed, that 'the right of individual privacy is essential to the well being of a free society, and shall not be infringed without the showing of a compelling state interest.' Today the vigor of that ringing proclamation has been drained, leaving it merely a hortative form of words.[40]

III. A CONTINUATION OF THE PRIVACY-ENHANCED ANALYSIS IN THE 1990S

Though *Long* remains in effect, its language has become somewhat of an anomaly in light of the court's more recent search and seizure decisions, which have further delineated the scope of Article II, § 10 and the effect of Montana's heightened

37. 216 Mont. 65, 700 P.2d 153 (1985).

38. *Id.* at 69, 700 P.2d at 156 (overruling State v. Van Haele, 199 Mont. 522, 649 P.2d 1311 (1982); State v. Hyem, 193 Mont. 51, 630 P.2d 202 (1981); State v. Helfrich, 183 Mont. 484, 600 P.2d 816 (1979); State v. Sawyer, 174 Mont. 512, 571 P.2d 1131 (1977); State v. Coburn, 165 Mont. 488, 530 P.2d 442 (1974); State v. Brecht, 157 Mont. 264, 485 P.2d 47 (1971)).

39. *Id.* at 71, 700 P.2d at 157.

40. *Id.* at 73, 700 P.2d at 158.

privacy right on the State's search and seizure jurisprudence. The supreme court has recognized, and continues to acknowledge, that the privacy guarantee is a necessary component of a search and seizure analysis. With the exception of *Long*, and an assortment of surveillance decisions, the court never strayed too far from this principle. As in earlier decisions, the relevance of § 10 in Montana's search and seizure analysis was assumed. For the court, the new task - and what distinguishes this last half-decade of cases - involved an attempt to further define the impact of § 10, and the extent to which the privacy interest could become a primary rationale in search and seizure cases. Thus, in *State v. Siegal*,[41] the court offered a blueprint for future search and seizure decisions, commenting that

> [w]hile we analyze most search and seizure questions implicating Article II, § 11 of Montana's Constitution under traditional Fourth Amendment principles enunciated by the federal courts and adopted in our own case law, in certain instances where Montana's constitutional right of privacy, Article II, § 10, is also specifically implicated, we must, of necessity, consider and address the effect of that unique constitutional mandate on the question before us.[42]

The court also quoted from *State v. Solis*[43]:

> There has been unnecessary emphasis on distinguishing right to privacy cases from search and seizure cases. The right to privacy is the cornerstone of protections against unreasonable searches and seizures. Thus, a warrantless search can violate a person's right to privacy and thereby violate the right to be free from unreasonable searches and seizures.[44]

The court then quoted extensively from the Verbatim transcripts of the Constitutional convention. These excerpts are cited elsewhere in this paper.[45] The court thus concluded that:

> In the face of th[e] history of Article II, § 10, we are compelled to conclude that the use of thermal imaging as a criminal investigative tool is the very sort of technology against which Article II, § 10 of the Montana's Constitution was enacted to guard.[46]

As the statements from *Siegal* indicate, the court, again, deliberately incorporated the privacy guarantee of § 10 into the

41. 281 Mont. 250, 934 P.2d 176 (1997).
42. *Id.* at 264, 934 P.2d at 184.
43. 214 Mont. 310, 316, 693 P.2d 518, 521 (1984)
44. *Siegal*, 281 Mont. at 191, 934 P.2d at 276.
45. 5 MONT. CONST. CONV. TR. 1681 (1972).
46. *Siegal*, 281 Mont. at 277, 934 P.2d at 192.

requirement of § 11, and created an independent search and seizure analysis distinct from federal law. In this sense, with decisions such as *Siegal*, the court began to consider, and implement the privacy guarantee not so much as an adjunct to search and seizure decisions, but as an independent reason for avoiding the limitations of federal search and seizure doctrines, and otherwise directing the court's search and seizure analysis.

In *Siegal*, the court applied the two-prong expectation of privacy test of *Katz*, and finding that the defendant had asserted an objectively reasonable expectation of privacy, the court added that the warrantless infringement of the defendant's privacy also required a compelling government interest to survive the court's review.[47] One author has argued that with this modified *Katz* test, the court used § 10 "as merely a supplement to § 11 in the second prong of its *Katz* analysis, [thereby] deny[ing] the privacy section any content distinct from search and seizure protection; that is under the *Siegal* approach, § 10 has no independent vitality."[48] It seems that the court's search and seizure analysis embodied a compromise with federal law rather than an outright rejection of the parameters set forth by the United States Supreme Court in its own search and seizure decisions.

Although the distinction between federal precedent and Montana's search and seizure law might, in some instances, seem artificial, the court's intent to establish an independent search and seizure analysis has been, and continues to be, unyielding. Thus, the threshold consideration in any search and seizure decision provides that, when analyzing search and seizure issues that implicate Montana's privacy right, the court will apply Article II, §§ 10 and 11 together, and separate from the restrictions of the federal Constitution. This specific privacy right does not have a federal constitutional counterpart, and therefore, assures Montanans broader protections than does the federal constitution. In turn, the privacy right dictates that, under the Montana Constitution, the range of valid warrantless searches is narrower than the corresponding range under the Fourth Amendment.[49]

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47. *Id.* at 278, 934 P.2d at 192.

48. William C. Rava, *Toward a Historical Understanding of Montana's Privacy Provision*, 61 ALB. L. REV. 1681, 1712 (1998). The author of this article criticizes the *Siegal* decision for relying too heavily on the *Katz* analysis and not crafting an independent right to privacy jurisprudence.

49. *See* State v. Hardaway, 2001 MT 252, & 57, 307 Mont. 139, & 57, 36 P.2d 900,

IV. DEVELOPMENTS IN MONTANA'S SEARCH AND SEIZURE ANALYSIS, INCLUDING A COMPARISON OF EARLY AND RECENT STATE CASE LAW

A. The Automobile Exception

The automobile exception to the warrant requirement is one of several doctrines implicated in cases involving searches of automobiles. First articulated by the United States Supreme Court in *Carroll v. United States*,[50] the exception dictates that the warrantless search of an automobile is permissible if supported by probable cause that the automobile contains contraband.[51] In *Carroll*, the Court based the exception on a distinction between houses and cars and, specifically, the mobility of the latter.[52] According to the Court, the "Fourth Amendment has been construed . . . as recognizing a necessary difference between a search of a store, dwelling house or other structure . . . and a search of a ship, motor boat, wagon or automobile . . . because the vehicle can be quickly moved out of [a] locality or jurisdiction. . . ."[53] In *United States v. Ross*[54] and *South Dakota v. Opperman*,[55] the Court further delineated this rational, stating that warrantless searches of cars are indispensable because the "nature of an automobile in transit"[56] produces "circumstances of such exigency that, as a practical necessity, rigorous enforcement of the search warrant requirement is impossible."[57]

If mobility provides the foremost justification for the exception, a supplemental theory exists in what the Supreme Court recognizes as a diminished expectation of privacy in an automobile. *California v. Carney*[58] offers, perhaps, the most salient discussion of this privacy rationale, as it is applied by the federal courts. *Carney* involved the warrantless search of a parked motor home, in which the defendant was suspected of

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& 57.

50. 267 U.S. 132 (1925).
51. *See id.* at 153.
52. *Id.*
53. *Id.*
54. 456 U.S. 798 (1982).
55. 428 U.S. 364 (1976).
56. *Ross*, 456 U.S. at 806.
57. *Opperman*, 428 U.S. at 367.
58. 471 U.S. 386 (1985).

operating a "drugs for sex" business.[59] On information that the defendant had invited a minor into the motor home, and had offered the child marijuana in exchange for sex, DEA agents entered the vehicle without a search warrant, and during a cursory inspection of the interior, discovered the contraband.[60] Following an unsuccessful attempt to suppress this evidence, the defendant was convicted of possession of marijuana on a plea of *nolo contendere*.[61] On certiorari review, the Supreme Court held that under the automobile exception, the warrantless search of the motor home did not violate the Fourth Amendment.[62]

The holding in *Carney*, necessitated - or facilitated - a different rational than had been used in *Carrol*, *Ross*, or *Opperman*. In *Carney*, the Supreme Court found that the requirement of a warrant to search a defendant's motor home was negated by the defendant's diminished expectation of privacy in the vehicle.[63] Noting that the particular "configuration" of a vehicle may contribute to this diminished privacy expectation, the Court found that "even in cases where an automobile [is] not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justif[ies] application of the vehicular exception."[64] The Court recognized that a motor home may function as a residence, but declined to infer a privacy interest from that fact. Instead, the Court explained that the source of the diminished privacy expectation in a motor home is the same as that of a car: its ready mobility and "the pervasive regulation of vehicles capable of traveling on public highways."[65] Thus, the Court determined that the defendant had a reduced expectation of privacy in his motor home, in part, because it was readily mobile, and "so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle."[66]

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59. *Id.* at 388.

60. *Id.*

61. *Id.* at 388-89.

62. *Id.* at 394.

63. *Id.* at 391-92. The Court focused less on the mobility prong of the exception, and turned, instead, to a discussion of the defendant's privacy interest. The Court implied that the absence of a privacy interest in the motor home "stemm[ed] from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling." *Id.* at 393.

64. *Carney*, 471 U.S. at 391-92.

65. *Id.*

66. *Id.* at 393.

The Montana Supreme Court first addressed the automobile exception in State v. Spielman,[67] and adopted, without modification, the federal standard for applying the exception. *Spielman* involved the warrantless search of a car that the defendants used to flee the scene of a robbery.[68] Police searched not only the passenger compartment, but also the trunk, where they found a black medical bag, which they presumed was stolen.[69] On appeal from their conviction of robbery and first-degree burglary, the defendants argued that the search of the car had exceeded the plain view doctrine.[70] The Montana court disagreed, concluding that even without a warrant or plain view, the search was valid under the automobile exception because police "had information which was . . . particular and reliable; [and] which matched the defendant's, their clothing, and their automobile. . . ."[71] Relying on *Chambers*, the court stated that the exception is appropriate for a "search . . . conducted on an automobile traveling on a public highway, pursuant to descriptive information known to the law enforcement officers conducting the search. . . ."[72] After *Spielman*, the court applied the automobile exception with regularity during the 1970's and 1980's.

Beginning in the 1990's, the court began to focus on the exigency requirement and to state that actual exigency was required in automobile cases.[73] In *State v. Elison*,[74] decided in 2000, the court reconsidered - and rejected - the idea that there was an express automobile exception as such. In *Elison*, the court concluded that, notwithstanding its earlier decisions, the automobile exception would no longer afford an avenue for circumventing the warrant requirement of the Montana Constitution.[75] *Elison* dictates that "a warrantless search of an

67. 163 Mont. 199, 516 P.2d 617 (1973).

68. *Id.* at 201-02.

69. *See id.* at 202.

70. *Id.* at 203.

71. *Id.* at 206.

72. *Id.* at 203.

73. *See* State v. Allen, 256 Mont. 47, 51, 844 P.2d 105 (1992) (stating that "the 'automobile exception' . . . 'requires two things (1) the existence of probable cause to search; and (2) the presence of exigent circumstances, that is, that it was not practicable under the circumstances to obtain a warrant.'" (citations omitted)). *See also* State v. McCarthy, 258 Mont. 51, 852 P.2d 111 (1993) and State v. Lott, 272 Mont. 195, 900 P.2d 306 (1995).

74. 2000 MT 288, 302 Mont. 228, 14 P.3d 456.

75. *Id.*, ¶ 54.

automobile requires the existence of probable cause as well as a generally applicable exception to the warrant requirement such as a plain view search, a search incident to arrest, or exigent circumstances."[76]

The warrantless search, in *Elison*, involved an investigatory stop, during which police rooted through the defendant's car, and found marijuana and drug paraphernalia behind the driver's seat and on the floor board.[77] Vacating the defendant's conviction, and holding that the search violated Article II, §§ 10 and 11, the Montana Supreme Court explained that the defendant had a reasonable privacy interest in areas where "items [could be] stowed in any automobile beyond the purview of the public," and that the warrantless search of the automobile invade[d] this legitimate interest."[78] According to the court, "even assuming compelling state interests may be implicated, 'the State may not invade an individual's privacy unless the procedural safeguards attached to the right to be free from unreasonable searches and seizures are met'."[79] For this reason, the court concluded that "[b]ecause of the legitimate privacy interests implicated and the invasive and generally overbroad nature of the state's intrusion on these interests, the search of an automobile requires more than merely the existence of probable cause to believe it contains evidence of a crime."[80]

The court in *Elison* expressly rejected the United States Supreme Court's reduced expectation of privacy analysis of automobiles. The court stated:

> We *do* believe that when a person rides in an automobile, that person accepts that their actions and any items left uncovered on the dashboard or on the seat are no longer private because of their public visibility. Even in Montana, when persons leave the privacy of their home and expose themselves and their effects to the public and its independent powers of perception, it is clear that they cannot expect to preserve the same degree of privacy for themselves or their affairs as they could expect at home.... However, when a person takes precautions to place items behind

76. *Id.*

77. *Id.*, ¶ 9. Prior to the search, the defendant admitted that he had hidden marijuana behind the seat. The investigating officer opened the driver's side door and tilted the front seat forward to find a film canister, which contained the marijuana. Continuing the search, the officer discovered a paper bindle, a two-inch tube, and a razor blade. *Id.*

78. *Id.*, ¶ 53.

79. *Id.* (quoting Hulse v. Dep't of Justice, 1998 MT 108, ¶ 34, 289 Mont. 1, ¶ 34, 961 P.2d 75, ¶ 34).

80. *Id.*, ¶ 54.

> or underneath seats, in trunks or glove boxes, or uses other methods of ensuring that those items may not be accessed and viewed without permission, there is no obvious reason to believe that any privacy interest with regard to those items has been surrendered simply because those items happen to be in an automobile. *Furthermore, there is no reason to believe that the 'pervasive and continuing governmental controls and regulations' of automobiles could serve to reduce someone's expectation of privacy in items so stowed.*[81]

B. Search Incident to Arrest

In its most imprecise form, the search incident to arrest exception to the warrant requirement provides that "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape."[82] However, with respect to its scope, the doctrine has evolved dramatically during the last forty years. Before 1969, warrantless searches incident to arrest extended to the area in the possession or control of the arrestee, including, as in *United States v. Rabinowitz*,[83] a desk, safe and file cabinets located the arrestee's office.[84] In *Chimel v. California*, the United States Supreme Court rejected this interpretation, and modified the doctrine to apply only to that area within an arrestee's reach.[85] *Chimel* involved, perhaps, the most liberal use of the search incident to arrest exception: a search of the defendant's entire house.[86] And, according to the Court, "[t]he [warrantless] search went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. . . . The scope of the search was, therefore, 'unreasonable' under the Fourth and Fourteenth Amendments. . . ."[87] In 1973, the United States Supreme Court adopted a bright line rule in *United States v. Robinson,* [88] and *Gustafson v. Florida*.[89] That bright line rule is that it is the arrest itself which applies the

81. *Id.*, ¶ 51 (emphasis added).
82. Chimel v. California, 395 U.S. 752, 762-63 (1969).
83. 339 U.S. 56 (1950).
84. *Id.* at 60-61.
85. *Chimel*, 395 U.S. at 768.
86. *See id.* at 753-54.
87. *Id.* at 768.
88. 414 U.S. 218 (1973)
89. 414 U.S. 260 (1973)

justification for the search; no further justification is needed.[90]

Montana's search incident to arrest exception requires a similar, albeit more regimented analysis dictated by statute as permitting a warrantless search only for purposes of protecting the police, preventing escape, or discovering contraband or instrumentalities used in the commission of an offense. In addition, the Montana Supreme Court has consistently declined to apply the doctrine absent one of these exigent circumstances. Only once did the court stray from the statutory analysis to apply the federal rule articulated in *Robinson* and *Gustafson*. In *State v. Ulrich*,[91] the court concluded that a neutron activation test for gunpowder residue "was within the permissible scope of a search incident to a lawful arrest under the Fourth Amendment."[92]

The court has since characterized *Ulrich* as an aberration, and has adhered to the general rule that "the scope of a warrantless search incident to arrest must be commensurate with its underlying purpose of preventing an arrestee from using any weapons . . ., escaping, or destroying any incriminating evidence. . . ."[93] Thus, in *State v. Hardaway*, the court overruled *Ulrich*, and held that the warrantless, post-arrest swabbing for blood amounts to an unreasonable search in violation of the Article II, §§ 10 and 11[94]. . . because it was not done for one of three allowable purposes: (1) protecting the officer from attack; (2) preventing the person from escaping; or (3) discovering and seizing the fruits of the crime.[95] Hardaway involved facts similar to *Ulrich*. Following his arrest in connection with a burglary, the defendant was detained in a county jail where police swabbed his hands for a blood sample to compare with blood found at the crime scene.[96] On appeal, the defendant argued that by swabbing his hands after the arrest, the police had conducted an unreasonable search.[97]

The Supreme Court agreed with the defendant, finding that no exigent circumstances existed for the search, and therefore,

90. *Robinson*, 414 U.S. at 235.
91. 187 Mont. 347, 609 P.2d 1218 (1980).
92. *Id.* at 352, 609 P.2d at 1221.
93. Sate v. Hardaway, 2001 MT 252, ¶ 57, 307 Mont. 139, ¶ 57, 36 P.2d 900, ¶ 57.
94. *Id.*, ¶¶ 57, 59.
95. *Id.*
96. *Id.*, ¶¶ 3-9.
97. *Id.*, ¶ 12.

no justification for the failure by officers to obtain a warrant.[98] The court stated that "consistent [with the] trend toward protecting the privacy interests of our citizens . . . specific and articulable exigent circumstances are required to justify and render lawful such a search."[99]

C. Open Fields

The United States Supreme Court first articulated the open fields doctrine in *Hester v. United States*,[100] holding that the Fourth Amendment, which protects "'persons, houses, papers, and effects,' is not extended to the open fields."[101] Relying on common law property concepts, the Court discerned that open fields are separable from curtilage, and, by implication, excluded from Fourth Amendment protections by virtue of its lack of proximity with the home.[102]

Since *Hester*, the Court has modified the common law rationale for the open fields doctrine to include a *Katz*-based privacy analysis. In *Oliver v. United States*,[103] the Court concluded that because open fields are so accessible, "the expectation of privacy in open fields is not an expectation of privacy that society would recognize as reasonable."[104] According to the court, "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference. . . . There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."[105] On this basis, the Court upheld the warrantless search and seizure of marijuana growing on the defendants' farm, and stated that "an individual may not legitimately demand privacy for activities conducted out of doors in fields except in the area immediately surrounding the home."[106] *Oliver*, and earlier decisions, do not suggest that the Court has abandoned the property distinction between open fields and curtilage. Rather, the Court has used the *Katz* test to reinforce that distinction by

98. *Id.*, ¶ 59.
99. *Id.*, ¶ 57.
100. 265 U.S. 57 (1924).
101. *Id.* at 59.
102. *See id.*
103. 466 U.S. 170 (1984).
104. *Id.* at 179.
105. *Id.*
106. *Id.* at 178.

defining, as objectively unreasonable, any expectation of privacy in open field.[107]

The Montana Supreme Court readily adopted this analysis in *State v. Charvat*,[108] a 1978 case involving the warrantless search of the area surrounding a defendant's abandoned ranch house.[109] Acting on information that the defendant was growing marijuana on his ranch, police entered the defendant's property, without a warrant, and discovered marijuana plants in an old corral, located fifty yards from the defendant's deserted home.[110] The officers returned with a warrant, and searched the property more thoroughly, finding, near the corral, a collection of plywood sheets covered with freshly picked marijuana.[111] At trial, the defendant moved to suppress the contraband as illegally seized.[112] The motion was denied, and on appeal from a conviction for selling and possessing dangerous drugs, the defendant argued that the marijuana was seized from an area constitutionally protected against unreasonable searches and seizures.[113]

Echoing the language of *Hester* and subsequent federal decisions, the Montana court determined that although the defendant had expressed a subjective expectation of privacy in the area surrounding his ranch house, the expectation was not objectively reasonable because "the marijuana plants were not in an area where any expectation of privacy exists and thus not a subject of the Fourth Amendment protection."[114] The court drew from *Katz* to determine that while the area surrounding a dwelling is private, what remains is inherently public, and "'[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of the Fourth Amendment protection'."[115] In support of its conclusion that the defendant did not have a reasonable expectation of privacy, the court noted that the marijuana was displayed out in the open, on property that was abandoned, in disrepair, and accessible to anyone.[116]

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107. *See id.* at 184.

108. 175 Mont. 267, 573 P.2d 660 (1978).

109. *Id.* at 268, 573 P.2d at 661.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 268, 573 P.2d at 661.

114. *Charvat*, 175 Mont. at 272, 573 P.2d at 663.

115. *Id.* at 271, 573 P.2d at 662 (citing Katz v. United States, 389 U.S. 347, 351 (1967)).

116. *Id.*

Charvat demonstrates that, for a time, the court was willing to rely solely on the federal definition of the open fields doctrine. During the two decades following *Charvat*, the court continued to recognize the doctrine, applying the *Charvat* analysis to unfenced property observable from adjacent roads[117] or from a distance (e.g., through a spotting scope).[118] Then, in 1995, the court altogether rejected the doctrine, and overruled *Charvat* and its progeny. In *State v. Bullock*,[119] the court offered the following rule for searches of open fields, stating that:

> [i]n Montana a person may have an expectation of privacy in an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable, and that where that expectation is evidenced by fencing, 'No Trespassing,' or similar signs, or 'by some other means [which] indicate[s] unmistakably that entry is not permitted . . . entry by law enforcement officers requires permission or a warrant.'[120]

The court based this new protection for open fields on a presumption that the distinction previously drawn between open fields and curtilage tended to subvert the explicit privacy guarantee of Article II, § 10 of the Montana Constitution.[121] In support of its use of § 10, the court returned to the observations of *State v. Sawyer*,[122] that the states are not restricted by limits placed on constitutional rights by the federal courts, and that Montana's explicit privacy right necessitates a stricter search and seizure requirement than that of the Fourth Amendment.[123]

Bullock involved the warrantless search of an area around the defendant's cabin, where police observed the carcass of an unlawfully poached bull elk.[124] According to the court, the defendant demonstrated at least a subjectively reasonable expectation in privacy in the area around his cabin by moving the building away from an adjacent road and into a forested area, fencing off his property, and limiting access to a single gate at which the defendant had posted "No Trespassing" signs.[125] According to the court, these "numerous precautions" indicated that the defendant's "expectation of privacy was

117. State v. Dess, 201 Mont. 456, 655 P.2d 149 (1982).
118. State v. Bennett, 205 Mont. 117, 666 P.2d 747 (1983).
119. 272 Mont. 361, 901 P.2d 61 (1995).
120. *Id.* at 384, 901 P.2d at 75-76.
121. *Id.* at 383-84, 901 P.2d at 75.
122. 174 Mont. 512, 571 P.2d 1131 (1977).
123. *See Bullock*, 272 Mont. at 384, 901 P.2d at 75.
124. *Id.* at 365-66, 901 P.2d at 64-65.
125. *Id.* at 384-85, 901 P.2d at 76.

reasonable," and entry onto the property by police amounted to an unreasonable search and seizure in violation of the warrant requirement of the Montana Constitution.[126]

D. Surveillance

The impact of Article II, § 10 on Montana's surveillance law has fluctuated considerably - particularly on the issue of consensual participant wiretapping. In *State v. Brecht*, (a pre-1972 Constitution case) the Montana Supreme Court held that to admit testimony of a private citizen obtained by listening over an extension phone to the defendant's conversation with a third party violated the search and seizure provision of the 1889 Constitution.[127]

In *State v. Brackman*,[128] the court concluded that Article II, §§ 10 and 11 preclude the warrantless monitoring and recording by police of a conversation between a suspect and an informant who consented to the eavesdropping.[129] The defendant, in *Brackman*, argued that to "allow warrantless consensual participant monitoring would have a 'chilling' effect on citizen discourse."[130] The court agreed, noting that a decision in favor of the defendant, and imposing a warrant requirement, would not create too heavy a burden for the police.[131] The court added that "[a] state is free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional grounds."[132]

Brackman's notion of a stricter warrant requirement for electronic surveillance resurfaced in the mid 1980's. In *State v. Solis*,[133] the court held that absent exigent circumstances, the police are required to show probable cause to support the issuance of a search warrant for eaves dropping.[134] In *Solis*, the defendant and an undercover police officer were recorded on

126. *Id.* at 385, 901 P.2d at 76.

127. *See* Elison and NettikSimmons, *supra* note 2, at 10.

128. 178 Mont. 105, 582 P.2d 1216 (1978).

129. *Id.* at 117, 582 P.2d at 1222.

130. *Id.* at 115, 582 P.2d at 1221.

131. *See id.* (stating that "[i]n all of the cases examined, none revealed the circumstances were so exigent that the law enforcement personnel would not have had time to obtain a search warrant").

132. *Id.* at 113, 582 P.2d at 1220.

133. 214 Mont. 310, 693 P.2d 518 (1984).

134. *Id.* at 319-20, 693 P.2d at 523.

video conducting transactions involving stolen property.[135] The trial court suppressed the video, and the State appealed.[136] The court determined, first, that the defendant exhibited an expectation of privacy in the video tapes because the recorded conversations took place in a small, enclosed office where the only other individual present was a friend of the defendant.[137] In addition, the court found that the defendant's expectation was reasonable because to rule otherwise would be to "violat[e] the intent of those who drafted the privacy section of our State Constitution."[138] With regard to the State's compelling interest, the court stated that "even when the State has such a compelling interest, the invasion of an individual's privacy may usually occur only with certain procedural safeguards," namely, the requirement of probable cause.[139]

The court then offered the following observation regarding the relevance of the privacy interest to Montana's search and seizure jurisprudence. According to the court,

> This area of law is confusing because of the numerous approaches to the right of privacy issue in the case law. There has been unnecessary emphasis placed on distinguishing right to privacy cases and seizure cases. The right to privacy is the cornerstone of protections against unreasonable searches and seizures. Thus, a warrantless search can violate a person's right of privacy and thereby violate the right to be free from unreasonable searches and seizures.[140]

Then surveillance cases began to follow the lead of *United States v. White*,[141] a wiretap case in which the United States Supreme Court held that the Fourth Amendment permitted the warrantless monitoring of conversations between a defendant and a consenting informant.[142] Comparing the informant to a "police agent who conceals his police connections . . . and may right down for official use his conversations with a defendant. . . ." the Court concluded that the "simultaneous recording of conversations made by [an] agent or by others from transmissions received from the agent to whom the defendant is talking . . . is constitutionally justifiable . . . [because] one

135. *Id.* at 313, 693 P.2d at 519.
136. *Id.* at 313, 693 P.2d at 520.
137. *Id.* at 314, 693 P.2d at 520.
138. *Id.* at 318, 693 P.2d at 522.
139. *Id.*
140. *Id.*
141. 401 U.S. 745 (1971).
142. *Id.* at 751-52.

contemplating illegal activities must realize that his companions may be reporting to the police."[143]

The Montana court offered similar opinions in *State v. Coleman*[144] and *State v. Cannon*.[145] Noting the inherent lack of privacy in telephone conversations, the court, in *Coleman*, stated that "it] has never held that a court order is necessary to monitor a telephone conversation, where one of the parties to the telephone conversation consents. . . . Neither party to a telephone conversation can ordinarily see the other. Neither has any way of knowing whether or not the conversation on the telephone is being overheard by other parties."[146] The court affirmed *Coleman* in *Cannon*, noting, however, that certain "tape recordings and transcriptions obtained through the use of an unauthorized electronic monitoring device may properly be suppressed on constitutional grounds."[147]

In *State v. Brown*,[148] the Montana court overruled *Brackman*, and found that the "warrantless consensual electronic monitoring of face-to-face conversations by the use of body wire transmitting device, performed by law enforcement officers while pursuing their official duties, does not violate the right to be free of unreasonable searches and seizures nor the privacy section of the Montana Constitution."[149] *Brown* involved the warrantless recording of the defendant and an informant who had consented to a body wire.[150] The recording took place when the defendant and the informant met in a hotel room to complete a drug sale.[151] On appeal from a conviction for the criminal sale of dangerous drugs, the defendant argued that, under *Brackman*, the right to privacy prohibited this type of body wire recording.[152]

Rejecting the *Brackman* analysis, as well as the defendant's argument, the court concluded that the defendant had "no reasonably justifiable expectation that statements made to another will be kept private by that person."[153] Recognizing that

143. *Id.*
144. 189 Mont. 492, 616 P.2d 1090 (1980).
145. 212 Mont. 157, 687 P.2d 705 (1984).
146. *Coleman*, 189 Mont. at 502-03, 616 P.2d at 1096.
147. *Cannon*, 212 Mont. at 162, 687 P.2d at 707-08.
148. 232 Mont. 1, 755 P.2d 1364 (1988).
149. *Id.* at 8, 755 P.2d at 1369.
150. *Id.* at 3-4, 755 P.2d at 1366.
151. *Id.*
152. *Id.* at 7, 755 P.2d at 1368-69.
153. *Id.* at 10, 755 P.2d at 1370.

"Montana's Constitutional protections have an existence which is separate from the federal Constitutional protections . . ." the court noted two additional justifications: first, that the participants to the conversation had equal interest in the conversation, whereby either participant could consent to the monitoring; and second, that the warrantless electronic monitoring in this case was not excessive because the defendant's statements to the informant were freely spoken.[154]

Still, a decade after *Brown*, the court again demonstrated its willingness to limit the use of surveillance as an investigative tool, when it blocked the State's use of nonconsensual wiretap evidence obtained in another jurisdiction. In *State v. Lynch*,[155] the court stated that "[n]on-consensual wiretapping is not permitted in Montana and any such evidence obtained in Montana by public officials is not admissible in this State's courts."[156]

Of course another electronic surveillance case is *State v. Siegal*, [157]which dealt with thermal imaging. In *Siegal* the court quoted the following from the Verbatim Transcript of the Constitutional Convention.

> First of all, we agree that we would go along with an amendment that would prohibit electronic surveillance in the State of Montana. . . . After listening to testimony, after examining briefs that were submitted to us, after analyzing the situation, it is inconceivable to any of us that there would ever exist a situation in the State of Montana where electronic surveillance could be justified. And the thinking throughout the United States is, electronic surveillance shall be justified only in matters involving national security, perhaps in matters involving certain heinous federal crimes where the situation is such that in those instances we must risk the right of individual privacy because there is a greater purpose to be served. But within the area of the State of Montana, we cannot conceive of a situation where we could ever permit electronic surveillance. And our intention was - - in responding to the proposed amendment; that we would not object to it - - was to allow an amendment that would prohibit electronic surveillance in the State of Montana.[158]

154. *Id.* at 9-11, 755 P.2d at 1370-71.
155. 1998 MT 308, 292 Mont. 144, 969 P.2d 920.
156. *Id.*, ¶ 15.
157. 281 Mont. 250, 934 P.2d 176 (1997).
158. *Id.* at 267-77, 934 P.2d at 192.

E. Standing

The Montana Supreme Court's application of the standing requirement for challenges to searches and seizures is notably lenient. The court has construed the requirement as involving something less than a possessory interest in the place searched or the thing seized, and more akin to the less restrictive, less tangible "legitimate expectation of privacy." And any modification of the doctrine has simply resulted in further clarification of the basic idea that standing to challenge a search and seizure is directly proportional to one's privacy interest.

This particular form of the standing requirement is not unique to Montana; but rather, is attributable to the United States Supreme Court. The concept of a non-traditional test for standing in search and seizure cases was best articulated in *Rakas v. Illinois*,[159] in which the Supreme Court noted that the common test for standing, requiring an injury in fact, and the assertion of one's own legal rights, is somewhat redundant when applied to the Fourth Amendment, which, by its terms, involves a strictly personal right.[160] According to *Rakas*, the more appropriate question, when considering a search and seizure challenge is whether "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."[161] On this basis, the Supreme Court concluded that "the capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[162]

The Montana Supreme Court affirmed the *Rakas* reasoning in *State v. Isom*.[163] The defendant in *Isom* was convicted of felony possession of dangerous drugs following a search of a

159. 439 U.S. 128 (1978).

160. *See id.* at 140.

161. *Id.*

162. *Id.* at 143. Though *Rakas* is often cited for its rejection of the notion that the standing requirement involves an ownership interest, the decision is equally significant for its abandonment of the automatic standing rule set forth in *Jones v. United States*. *See id.* (citing Jones v. United States, 362 U.S. 257, 267 (1960)). Before *Rakas*, automatic standing, under *Jones* was available to "anyone legitimately on the premises where a search occurs. . . ." *Jones*, 362 U.S. at 267. The Court, in *Rakas*, suggested that the rule was too broad, and limited its relevance to the facts of *Jones*. *See Rakas*, 439 U.S. at 143. In short, *Rakas* is as much a limitation on the standing requirement as it is an expansion of the concept.

163. 196 Mont. 330, 641 P.2d 417 (1982).

home in which the defendant was a guest.[164] The central issue, on appeal, was whether the defendant lacked standing to challenge the search and seizure in light of his status as an overnight guest. The Montana court held that because the standing requirement is not based on ownership, "the fact that the defendant was an overnight guest [did] not control a determination of his standing to contest the legality of the search of a the residence. . . ."[165] Because contraband was discovered in an area where the defendant, the sole occupant of the house, slept and stored his belongings, the defendant had demonstrated a "reasonable expectation of freedom from governmental intrusion . . . ," which served as an adequate basis for standing to challenge the search and seizure.[166]

The court expanded *Isom* in *Bullock*, affirming the holding of that case, and adding that, contrary to the federal trend, standing to challenge a search and seizure would attach to any defendant charged with a crime involving the element of possession.[167] The so-called "automatic standing rule" was earlier rejected by the United States Supreme Court, but had survived in several state jurisdictions.[168] Thus, the Montana court adopted language from a New Jersey decision, which indicated that "where a defendant is charged with an offense in which possession of the seized evidence at the time of the contested search is an essential element of guilt," standing is automatic.[169] Applying automatic standing, the court determined that the defendant, who was charged with unlawfully possessing a killed animal, could challenge the search and seizure of the carcass even though the search and seizure occurred at another's residence.[170]

V. SUGGESTIONS FOR THE FUTURE.

The present jurisprudence of the Montana Supreme Court

164. *Id.* at 333-34, 641 P.2d at 419.

165. *Id.* at 338, 641 P.2d at 421.

166. *Id.*

167. State v. Bullock, 272 Mont. 361, 371-73, 901 P.2d 61, 67-69.

168. *See id.* at 372, 901 P.2d at 68.

169. *Id.*

170. *Id.* at 373, 901 P.2d at 69. The court affirmed the automatic standing rule in *State v. Parker*, stating that, under *Bullock*, the defendant, a passenger in a vehicle, had standing to challenge a search of the vehicle because the defendant was charged with possession of some of the contraband discovered in the car. State v. Parker, 287 Mont. 151, 157-58, 953 P.2d 692, 696 (1998).

reflects the intent of the framers of the 1972 Constitution. Montana's Constitution history provides rich material to support the court's independent right to privacy jurisprudence.[171] One author has already criticized the Montana Supreme Court for inadequate use of history to buttress its right to privacy jurisprudence.[172] We are forced to agree. *State v. Siegal* and more recently *State v. Hardaway* give the most detailed historical support for their opinions. However, neither make adequate use of the rich historical record supporting an independent privacy based jurisprudence.

The Constitutional Convention prepared numerous studies with particular attention given to the Declaration of Rights.[173] The study argued that existing federal guarantees were inadequate and suggested that Montana should supplement "existing rights provision" and give other new constitutional status. The study concluded that an express privacy provision should be added.[174]

Perhaps the most powerful statement supporting the right to privacy is from the Bill of Rights Committee Proposal.

> The Committee unanimously adopted this section - similar to delegate proposal no. 33 - in order to guarantee of privacy. What it accomplishes is the elevation of judicially-announced right of privacy to explicit constitutional status. The right has been guaranteed in case law at the federal level . . . and in Montana . . . The Committee believes the Constitution should specify that the only circumstance in which the right of privacy may be infringed is following the showing of a compelling state interest. This is in response to the increasing danger of eclipse in an advanced technological society. The point of this provision is not to prohibit all invasions of privacy but to require that no invasion of privacy should occur until and unless a compelling sate interest has been established.
>
> The Committee proposed a broad provision in this area to permit flexibility to the courts in resolving the tension between public interests and privacy. It is hoped that the legislature will have occasion to provide additional protections for the right of privacy in explicit areas where safeguards are required. An example of a potential legislative subject matter can been seen in delegate proposal no. 124 which prohibited requiring submission to a lie detector or similar test as a condition of employment.[175]

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171. *See* Rava, *supra* note 48, at 1692-94.
172. *See id.* at 1691-92, 1709-12.
173. *See* Rava, *supra* note 48, at 1692-93.
174. *Id.* at 1693-94.
175. 5 MONT. CONST. CONV. TR. 632-33 (1972).

In *Siegal,* the court did cite Verbatim Transcripts. However, a look at other important right to privacy cases reveals very little reliance on constitutional history. In *State v. Bullock*, citing no history whatsoever, the court stated "based on this State's Constitution, and its expressed regard for individual privacy, we decline to follow the U.S. Supreme Court's distinction between curtilage and open fields. . . ."[176] The court then analyzed prior Montana cases and cases from other jurisdictions to support its conclusion that the State's strong tradition of respect for individual privacy required the court to overrule prior cases recognizing the concept of "open fields." In *Elison*, the court cites *Bullock* and cases cited therein for the proposition that "Montana's unique constitutional language affords citizens a greater right to privacy and therefore broader protection than the Fourth Amendment."[177] In *State v. Hardaway*, the opinion includes a lengthy discussion of prior case law but again no specific reference to Montana's Constitutional history.

The previous discussion is not meant to criticize the foregoing cases but to suggest that the state's rich constitution history could enhance the courts rational for its privacy enhanced jurisprudence which is true to the intent of the framers of the Montana Constitution. In fact, Montanan's Constitutional history would lend support to a right to privacy jurisprudence that was even more independent of federal norms than is currently the case. Montana's Constitutional history suggests the following: (1) At each stage of Montana's Constitutional history (even prior to 1889, dissatisfaction was expressed over the scope of federal protection (2) The remedy was to adopt changes that were "more reflective of Montana's unique character" (3) The intent was always on the expansion of individual rights.[178] By using the records of the history of both 1889 and 1972 beyond that of the statement of the delegates, the court's statement regarding the scope of privacy right could be buttressed.[179] Truly the Court could convincingly demonstrate that its current jurisprudence is truly a return to first principles.

176. State v. Bullock, 272 Mont. 361, 376, 901 P.2d 61, 71.
177. State v. Elison, 2000 MT 288, ¶ 46, 302 Mont. 228, ¶ 46, 14 P.3d 456, ¶ 46.
178. *See Rava, supra* note 48, at 1698.
179. *See generally*, 1 MONT. CONST. CONV. TR. 71-72 (1972).